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8 **UNITED STATES BANKRUPTCY COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10 **SACRAMENTO DIVISION**

11
12 In re
13 OAK SONG, LLC,
14 Debtor.

Case No. 10-39123

Chapter 11

DC No.: BN-001

15 **MOTION FOR ORDER EXCUSING**
16 **TURNOVER PURSUANT TO**
17 **BANKRUPTCY CODE §543 AND**
ALLOWING RECEIVER TO REMAIN IN
POSSESSION OF REAL PROPERTY

18 Hearing Date: August 25, 2010
19 Time: 10:00 a.m.
20 Location: 501 I Street, 6th Floor
Courtroom 35, Dept. C
Sacramento, California

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22 TO THE HONORABLE CHRISTOPHER KLEIN, UNITED STATES BANKRUPTCY JUDGE,
23 THE DEBTOR, THE UNITED STATES TRUSTEE AND OTHER PARTIES IN INTEREST:

24 JPMorgan Chase Bank, National Association ("JPMC") hereby submits this Motion for
25 Order Excusing Turnover and Allowing Receiver to Remain in Possession (the "Motion") in
26 connection with the above-captioned chapter 11 case of Oak Song, LLC ("Oak Song" or

1 “Debtor”).

2 **I. INTRODUCTORY STATEMENT**

3 The facts of this case support the retention of Richard L. Sweeney of Preferred Realty
4 Advisors (the “Receiver”) as receiver over real property commonly known as 9205 Folsom
5 Boulevard, Sacramento, California (the “Property”), which is improved with a five-unit strip
6 mall, with four of the units currently occupied. With little hope for a successful reorganization,
7 the Debtor has filed this Chapter 11 case with the sole purpose of attempting to frustrate the
8 Superior Court’s desire to have an independent receiver take possession, custody and control of
9 the Property to preserve its value. By this Motion, JPMC, a secured creditor of the Debtor, seeks
10 an order excusing the Receiver from complying with sections 543(a) and 543(b)(1) of the
11 Bankruptcy Code.

12 It is imperative that the Receiver be allowed to remain in place and continue to possess
13 and manage the Property. The Property is presently in a highly sensitive stage. The Receiver,
14 who has already invested the significant time and effort necessary to maintain the Property and
15 who has expertise in managing properties of this size and nature, is the most efficient choice to
16 meet the variety of needs that are looming, including the eviction of non-paying tenants. Last
17 month, the Receiver served 3-Day Notices on two of the tenants, and would continue to handle
18 efficiently the eviction and re-leasing efforts.

19 This Motion, the supporting declaration and its attached exhibits, will demonstrate the
20 important role the Receiver has played, and the need for his continued role, in protecting the
21 value of the Property. Even under the best scenarios there is no recognizable value in the
22 Property remaining for unsecured creditors over and above JPMC’s fully perfected and
23 undisputed first priority lien.

24 **II. FACTUAL BACKGROUND**

25 Prior to the petition date, on April 29, 2010, the Superior Court entered its Order
26 Appointing Receiver and Confirming Preliminary Injunction following the default of the Debtor

1 on its obligations under the Note and Deed of Trust, including the failure to make the monthly
2 payments due under the Note on December 1, 2009, and each month thereafter.¹ By reason of the
3 Debtor's failure to cure defaults under the Note and Trust Deed, JPMC exercised its rights and
4 remedies under the Loan Document including proceeding with foreclosing on the Trust Deed.
5 True and correct copies of the Note and Trust Deed are attached to the Fadum Declaration as
6 Exhibits A and B respectively.

7 At the time of his appointment, the Receiver took immediate steps to remedy the problems
8 at the Property, including commencing eviction procedures for non-paying tenants, maintaining
9 the Property, clearing overgrown weeds and shrubs on the premises, and facilitating an
10 environmental inspection. Since his appointment, the Receiver has been faced with non-paying
11 tenants and has issued two 3-Day Notices in order to free up two units for future leasing.

12 A trustee's sale of the Property was set to occur on July 22, 2010. However, the Debtor
13 filed its Chapter 11 petition, commencing this case and staying the trustee sale. The Debtor has
14 yet to file its bankruptcy schedules, so its position as to the value of the Property is unknown,
15 although the Debtor does acknowledge that its bankruptcy case is a single asset real estate case
16 and that the Property generates all of its income.

17 JPMC believes that it is not protected with any equity cushion, considering the fact that
18 the Debtor purchased the Property in July of 2008, at the height of the recent real estate market.
19 The Property is encumbered with JPMC's first priority lien, securing an unpaid balance
20 exceeding \$1,204,516.95. Because the Property is significantly encumbered by JPMC's first
21 priority lien, it is imperative that an experienced receiver continue to oversee and manage the
22 Property, as sale of the Property may be JPMC's sole source of recovery. Prior to the Receiver's
23 appointment, the Debtor had failed to make approximately five payments to JPMC, which
24 provided the Superior Court with ample justification for appointing the Receiver to manage the

25 ¹ On April 1, 2010, prior to the appointment of the Receiver, the Debtor made a partial payment of \$20,000, in order
26 to forestall the receiver action until April 12, 2010. Around the time of the Superior Court's appointment of the
Receiver, JPMC credited this amount against the Debtor's indebtedness.

1 Property.

2 Since his appointment, the Receiver has been instrumental in stabilizing the Property and
3 getting all facets of the Property back on track. In brief, the Receiver has secured and maintained
4 the Property, commenced eviction procedures for non-paying tenants, and cleared overgrown
5 weeds and shrubs on the premises to address a safety concern.

6 **A. Qualifications of the Receiver**

7 The Receiver has significant independent expertise, having worked as a receiver and
8 property consultant for more than 22 years. A copy of Receiver's resume with respect to such
9 matters is attached as Exhibit C to the Fadum Declaration.

10 **B. Urgency of Maintaining the Receivership Estate**

11 While the Receiver has been important thus far, his continued oversight is critical to
12 maintaining the value of the Property. The Receiver is poised to begin necessary evictions and to
13 continue in his duties to preserve the Property as provided in the Order Appointing Receiver, a
14 true and correct copy of which is attached as Exhibit A to the Declaration of Richard L. Sweeney.

15 **C. There is Little Equity in the Property**

16 As described in the state court pleadings filed by JPMC against the Debtor and his co-
17 borrower, the Property is improved with a five unit commercial strip mall. The Debtor has yet to
18 file its bankruptcy schedules, so its position as to the value of the Property is unknown. JPMC
19 believes that it is not protected with any equity cushion, considering the fact that the Debtor
20 purchased the Property in July of 2008, at the height of the recent real estate market.

21 The Property is encumbered with JPMC's first priority lien, securing an unpaid balance
22 exceeding \$1,204,516.95. No interest of any other creditor will suffer if the Receiver is
23 maintained in his capacity. As of August 1, 2010, there was due, owing, and payable on the Note,
24 the principal sum of \$1,204,516.95, together with accrued unpaid interest from in the sum of
25 \$54,494.69, default interest in the sum of \$37,473.86, plus accruing interest and late charges,
26 fees, and costs of suit in amounts not yet determined.

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1 129 B.R. 550, 558 (Bankr. N.D. Ill. 1991); *In re Constable Plaza Associates, L.P.*, 125 B.R. 98,
2 103 (Bankr. S.D. N.Y. 1991); *In re Poplar Springs Apartments of Atlantic, Ltd.*, 103 B.R. 146,
3 150 (Bankr. S.D. Ohio 1989); and *In re Willowood East Apartments of Indianapolis*, 117 B.R.
4 320, 322 (S.D. Ohio E.D. 1990).

5 Here, the Receiver is well-qualified to act in his present capacity, and the time and value
6 concerns presently implicated mandate the continuation of the Receiver's appointment to protect
7 and preserve the value of the Property. As detailed above, the Property, and thus the interests of
8 the creditors, needs the Receiver's competent management and skill. Prior to the Receiver's
9 appointment, the Debtor had failed to make five monthly payments to JPMC. Finally, it appears
10 that all value will devolve on JPMC as the secured creditor; the efficiencies to be realized from
11 maintaining the Receiver's oversight of the Property clearly counsel for excusing the Receiver's
12 compliance with the turnover and other obligations of Section 543.

13 As the Debtor has yet to file a plan of reorganization, it is not entirely clear whether there
14 is a likelihood of a successful reorganization. The Debtor has filed its Disclosure of Single Asset
15 Real Estate, which states that the Property generates all of the Debtor's income. What is clear is
16 that there is little reason to believe that other creditors' interests will suffer by keeping the Debtor
17 out of possession of the Property as the Receiver is more than able to maintain its value.

18 **V. CONCLUSION**

19 WHEREFORE, JPMC respectfully request entry of an order granting (a) the relief
20 requested herein; and (b) such other and further relief as is just and proper under the
21 circumstances.

22 DATED: August 3, 2010

BUCHALTER NEMER, PC

24 By: /s Craig C. Chiang
25 CRAIG C. CHIANG
26 Attorneys for JPMorgan Chase Bank, National
Association